Supreme Court, U.S.
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No. 99-568

In The

Supreme Court of the United States

JENNIFER EFRON, a minor, by and through DAVID EFRON and MADELEINE EFRON, her next friends,

Petitioners,

v.

THE UNITED STATES OF AMERICA; and THE DEPARTMENT OF IMMIGRATION AND NATURALIZATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE COMMONWEALTH OF PUERTO RICO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Commonwealth of Puerto Rico urges this Court to grant the petition before its consideration because it presents a substantial, unresolved question of vital importance to the petitioner, to other persons similarly situated, and to the Commonwealth of Puerto Rico.[1] The petition asks this Court to decide whether it is constitutionally permissible for the United States to bar its own citizens who are born in Puerto Rico from applying for constitutionally protected citizenship, while nonetheless affording the opportunity to obtain naturalized, constitutionally protected citizenship to resident aliens. The District Court dismissed petitioner's claim, finding that this discrimination satisfied a "rational basis" analysis. The Court of Appeals affirmed without opinion. Neither court, however, weighed into its analysis the relevance of the unique one hundred year relationship between Puerto Rico and the United States. *See Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976) (noting that "Puerto Rico occupies a relationship to the United States that has no parallel in our history"). Nor did the courts below assess whether the rationality of federal policy is drawn into question by the

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[1] Since 1917 federal statutes have recognized that persons born in Puerto Rico are United States citizens. *See* Jones Act, 39 Stat. 951, 953 (1917); Immigration and Nationality Act § 302, 8 U.S.C. § 1402. Statistics from the United States Bureau of the Census indicate that presently there are between two and a half to three million (2,500,000 – 3,000,000) Puerto Rican born United States citizens living in the States of the Union, and approximately four million (4,000,000) other such United States citizens living in the island of Puerto Rico.

stigmatizing effect of 8 U.S.C. § 1427, which, in a discriminatory fashion, singles out persons born in Puerto Rico – a United States territory – for disfavored treatment in comparison with persons from foreign nations. This Court should grant the petition at bar in order to identify the proper legal framework for assessing a classification that discriminates in this manner, and thus disadvantages and stigmatizes Puerto Rican born United States citizens on the basis of their birth in a United States territory. Such serious issues require definite resolution and "warrant the full attention of this Court before [they be] made part of our constitutional jurisprudence". *See Harris v. Rosario*, 446 U.S. 651, 654 (1980) (Marshall, J., dissenting).

INTEREST OF THE AMICUS COMMONWEALTH OF PUERTO RICO

The Commonwealth of Puerto Rico has a profound interest in the status and welfare of the several million United States citizens born therein and in the juridical status of these persons to the United States. Under the terms of 8 U.S.C. § 1427, persons of Puerto Rican birth are largely ineligible to apply for "naturalized" United States citizenship that, once granted, would be irrevocable under the Fourteenth Amendment to the United States Constitution. *See Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). The inability to be considered for constitutionally protected, naturalized citizenship constitutes a present injury to persons of Puerto Rican birth. There can be no doubt that constitutionally protected United States citizenship is a very great benefit. Just as clearly, there can be no doubt that the denial of the opportunity to be considered for a

valuable benefit constitutes a significant, present injury. *See Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (recognizing that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group", a member of the disadvantaged group suffers "injury in fact", regardless of whether "he would have obtained the benefit but for the barrier"); *Regents of the University of California v. Bakke*, 438 U.S. 265, 280-81 n. 14 (1978) (also finding that denial of opportunity to pursue a benefit constitutes a present injury).

In this case, the injury to petitioner and to members of her group is significantly greater because it is stigmatizing. *Cf. Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) (noting "the danger of stigma and stirred animosities" that result from the drawing of lines based on race or religion); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (noting that race-based classifications "threaten to stigmatize persons by reason of their membership in a racial group and to incite racial hostility"). When the United States government singles out its own citizens based on their birth in Puerto Rico as unable to apply for constitutionally protected naturalized citizenship, it sends an unmistakable message that Puerto Rican born United States citizens – defined by place of birth, not individual descent – are a class apart. Puerto Rican born United States citizens are thus marked as undeserving of the protection accorded to other United States citizens who

acquire constitutionally protected citizenship by birth,[2] or to citizens of foreign nations who are eligible to apply for naturalized citizenship.

Neither the injury nor the stigma to petitioner and members of her group is alleviated by the suggestion that persons born in Puerto Rico enjoy "statutory" United States citizenship under 8 U.S.C. § 1402. This Court has held that statutory citizenship is subject to divestment by Congressional imposition of "condition[s] subsequent." *Rogers v. Bellei*, 401 U.S. 815, 834-35 (1971). Even if this Court would not extend its holding in *Rogers v. Bellei* (which involved a repeal of statutory citizenship to foreign-born offspring of United States citizens who did not reside in the United States) to permit Congress to divest the citizenship conferred under 8 U.S.C. § 1402, persons born in Puerto Rico who currently enjoy such "statutory" citizenship are assigned at best to a stigmatizing "limbo" category. They are uncertain of their citizenship rights and are denied the opportunity to achieve assurance, through naturalization, of constitutionally protected citizenship. *See Afroyim v. Rusk, supra*, 387 U.S. at 268 (holding that Congress cannot divest the Fourteenth

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[2] In *Downes v. Bidwell*, 182 U.S. 244, 251 (1901), a case dealing with the revenue clauses of the Constitution, the Court's plurality opinion stated in dicta that the Fourteenth Amendment's citizenship clause did not apply to Puerto Rico. Two years later, however, the Resident Commissioner of Puerto Rico in Congress argued before this Court as amici that a citizen of Puerto Rico was a constitutional citizen of the United States by virtue of his birth within a United States territory. This Court, while characterizing said argument as "excellent", nonetheless determined that reaching the merits thereof was unnecessary to resolve the controversy before it. *See Gonzales v. Williams*, 192 U.S. 1, 12 (1903).

Amendment citizenship established by birth or naturalization).

Beyond its interest in the welfare of its citizens the Commonwealth of Puerto Rico has an interest in the juridical status of the several million persons born therein, who themselves are United States citizens. Such status is defined under the Constitution and Laws of the United States.

REASONS FOR GRANTING THE PETITION

This case presents an urgent and unique opportunity for this Court to decide what standard of constitutional review applies to a statute that discriminates against United States citizens born in Puerto Rico by denying them an opportunity to acquire constitutional citizenship when that very same opportunity is readily afforded to aliens recently arrived to this Country from virtually every nation. In rejecting the petitioner's constitutional claims the district court cited cases in which this Court has affirmed Congress's broad discretion to grant or withhold naturalization and in which courts have emphasized the "highly deferential" nature of the "rational basis" standard of analysis. This case, however, presents a novel question which should be answered by this Court. Unlike the naturalization cases relied on by the district court, this case does not involve discrimination against or among foreign nationals, but in favor of foreign nationals and against persons born in a Commonwealth of the United States. It is a case of a person with an inferior type of United States citizenship seeking to

fully perfect the same within the meaning of the Fourteenth Amendment.

In cases involving stigmatizing classifications that bear no relationship to individual descent, this Court has occasionally prescribed elevated scrutiny, *see, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that classifications based on illegitimacy are invalid unless "substantially related to an important governmental objective"), or signaled the appropriateness of a less than wholly deferential form of "rational basis" review, *see, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (finding no rational basis for denial of permission to operate a group home for the mentally retarded).[3]

It is an important and undecided question of federal constitutional law whether such an approach is called for in a case involving the stigmatizing discrimination against a group of United States citizens based solely on their birth in Puerto Rico and in favor of citizens of all nations in the world.[4] This Court has described the relationship between the United States and Puerto Rico as having "no parallel in our history." *See Examining Board of Engineers, Architects and Surveyors, supra*, 426 U.S. at 596.

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[3] *See also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985) (finding no rational basis for a statute imposing higher taxes on out-of-state than domestic companies); *Zobel v. Williams*, 457 U.S. 55 (1982) (holding that the rational basis test bars a state from affording preferential treatment to older over newer residents).

[4] In this respect, this case is unlike cases in which this Court has held that Congress, pursuant to the rational basis standard, may treat Puerto Rico less favorably than States. *See, e.g., Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam).

In light of this relationship, this Court should grant the instant petition in order to consider whether, under a constitutional test appropriately crafted to reflect Puerto Rico's unique and special status as a Commonwealth of the United States, the United States government can adequately justify stigmatizing United States citizens of Puerto Rican birth by denying them the opportunity of obtaining Fourteenth Amendment citizenship – an opportunity that is available to persons born in the States by birth, and to citizens of other nations by naturalization.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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